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No. 08-151

In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

CITIZENS FOR TAX REFORM, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR THE PETITIONER

This case raises the critical issue of how States may regulate an increasingly important part of the election process—the gathering of signatures to place initiatives and candidates on the ballot. In its Brief in Opposition ("Opp."), Respondent Citizens for Tax Reform ("CTR") only confirms, rather than negates, the need for this Court to review the Sixth Circuit's erroneous opinion. In holding that Ohio's payment-per-signature ban violates the First Amendment, the Sixth Circuit departed from the decisions of both its sister circuits and this Court, and it improperly restricted Ohio's ability to combat demonstrated fraud in the petition-circulating process.

A. A clear division of authority exists among the courts of appeals in applying the *Timmons* balancing test to payment-per-signature rules.

The Sixth Circuit's decision conflicts squarely with the decisions of three other courts of appeals. The Ohio law at issue provides: "No person shall pay any other person for collecting signatures on election-related petitions or for registering voters except on the basis of time worked." Ohio Rev. Code § 3599.111(D). Other States' prohibitions, upheld by other courts of appeals, are virtually identical. The Oregon law sustained by the Ninth Circuit prohibits paying circulators "based on the number of signatures obtained on an initiative or referendum petition" and permits only those payment methods that are "not based, either directly or indirectly, on the number of signatures obtained." *Prete v. Bradbury*, 438 F.3d 949, 952 (9th Cir. 2006) (quoting Or. Const. art. IV, § 1b). Along strikingly similar lines, New York—in a law upheld by the Second

Circuit, *Person v. N.Y. State Bd. of Elections*, 467 F.3d 141 (2d Cir. 2006) (per curiam)—prohibits paying circulators "upon the basis of the number of names to such petition procured by such person, or at a fixed amount per name." N.Y. Elec. Law § 17-122(4). And the North Dakota law sustained by the Eighth Circuit bans payment "'on a basis related to the number of signatures obtained.'" *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616 (8th Cir. 2001) (quoting N.D. Cent. Code § 16.1-01-12(11)) ("*IRI*").

CTR identifies no textual differences between these various statutes, nor could it, since none exists. Instead, CTR asserts that the division of authority is illusory because the Sixth Circuit applied the same *standard* as the Second, Eighth, and Ninth Circuits; the outcomes differed only because each case featured different *evidence*. CTR is incorrect.

To begin with, even if the circuit courts all cited *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), that does not mean, as CTR suggests, that they all applied the same standard. For one thing, CTR ignores the strong similarities in the evidence offered in each of the relevant cases. Moreover, to the extent that CTR is correct that evidentiary differences existed among the various cases, that fact only underscores the degree to which the lower courts are confused over how to apply the *Timmons* framework. Specifically, the appeals courts are sharply divided over how, under *Timmons*, to assess the severity of the burden on speech rights and the strength of the State's interest in combating fraud.

CTR's evidence that the Ohio statute burdens its speech rights is strikingly similar to the evidence rejected as insufficient in *Prete*. In both cases, the pay-per-signature ban's challengers introduced affidavits indicating that the prohibition would make signature gathering more expensive and might cause "professional" circulators to quit working in the State. *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 383-84 (6th Cir. 2008); *Prete*, 438 F.3d at 964-65. In *Prete*, that evidence was insufficient to establish a "severe burden" under *Timmons*. *Prete*, 438 F.3d at 965-66. Yet in this case, the district court and the Sixth Circuit reached the opposite conclusion. *Citizens for Tax Reform*, 518 F.3d at 386-87. Thus, the Sixth Circuit has disagreed with its sister circuits on how to assess evidence in determining the severity of the burden on speech rights.

The Sixth Circuit also disagreed with its sister circuits on how to apply the *Timmons* "state interest" prong. In *IRI*, North Dakota introduced evidence of a correlation between payments by the signature and petition fraud: Students were paid 25 cents per signature, and "[t]here were reported irregularities—taking names out of the phone book, etc." *IRI*, 241 F.3d at 618. Ohio introduced precisely the same type of evidence—that, among other things, circulators for Ralph Nader's 2004 presidential candidacy who were paid by the signature engaged in fraud. See *Citizens for Tax Reform*, 518 F.3d at 387. The State also introduced evidence, including an affidavit from a member of a county board of elections and an indictment, revealing specific instances of fraud committed by circulators who were paid by the signature. See Pet. at 6. Notwithstanding *IRI*, the

Sixth Circuit disregarded all of this evidence as insufficient because it proved only correlation, not causation—even though the Eighth Circuit did not insist on evidence of causation. *Citizens for Tax Reform*, 518 F.3d at 387.

The strong parallels between the evidence that other courts accepted but the Sixth Circuit rejected shows just how divided the lower courts are in applying *Timmons*. This Court's guidance is required.

Moreover, even if CTR is correct (and it is not) that the divergent results of the circuit courts is explained entirely by those courts' differently weighing the interests involved, that assertion still does not explain away the conflict among the various courts. First and foremost, determining the existence of a burden and evaluating the strength of the State's interest are, by their nature, legal judgments, and opposing answers to these inquiries are, by definition, conflicts. See, e.g., *Caruso v. Yamhill County*, 422 F.3d 848, 859 (9th Cir. 2005) (character and extent of a statute's burden on a petition circulator's First Amendment rights amounts to a question of law); *Krislov v. Rednour*, 226 F.3d 851, 859 (7th Cir. 2000) (character and extent of a ballot-access statute's burden on candidates' First Amendment rights is a question of law); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 871 (5th Cir. 1993) (en banc) ("With issues of substantive due process, equal protection, and the First Amendment, the weight of a state's interest has always been a legal question, not a factual one."). Second, if CTR's approach to defining a division of authority were to prevail, a

"circuit split" would be a rare bird indeed. Many divisions in authority could be attributed to a differing weighing of the record—such as what constitutes a reasonable search and seizure, e.g., *Georgia v. Randolph*, 547 U.S. 103, 108 (2006), or a reasonable restriction of speech on government property, e.g., *United States v. Kokinda*, 497 U.S. 720, 724 (1990); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 43 n.6 (1983)—rather than the application of a different legal standard. This Court's review is warranted not only when the circuit courts diametrically disagree on the application of particular tests, but also when they reach opposite outcomes in functionally identical cases. The latter is the situation here.

Finally, the Sixth Circuit did not and cannot avoid a conflict with its sister circuits by adopting an unduly broad reading of Ohio's law. The appeals court read the statute to prohibit a series of practices that the Ninth Circuit held permissible under Oregon's pay-per-signature prohibition, such as giving raises to productive circulators and terminating unproductive circulators. *Citizens for Tax Reform*, 518 F.3d at 385 (quoting *Prete*, 438 F.3d at 952 n.1 (quoting Or. Admin. R. 165-014-0260)). The question whether Ohio prohibited these practices was not briefed before the court; CTR was never charged with violating the statute for engaging in them; and CTR never sought a declaration that these practices would not violate the statute. In any event, by applying the Ohio statute to hypothetical scenarios, the Sixth Circuit misinterpreted the law, because the statute's requirement that signature-gatherers be paid "on the basis of time worked," Ohio Rev. Code § 3599.111(D), does not on its face prohibit

giving performance-based raises or terminating unproductive employees. Indeed, at oral argument, counsel for Ohio assured the Sixth Circuit that such practices are permissible under the statute. Compact disc: Oral Argument in *Citizens for Tax Reform v. Deters*, 6th Cir. Case No. 07-3031 at 2:00-2:12, 3:26-5:28 (Nov. 30, 2007). In any event, even if the Ohio statute were properly interpreted as broadly as the Sixth Circuit suggests, nothing in the record suggests that the State's interest in banning fraud or the ostensible burden imposed on CTR by the application of the statute would be materially altered.

B. The Sixth Circuit decided an important federal question in a way that conflicts with relevant decisions of this Court.

The Sixth Circuit not only created a conflict with its sister circuits, but it also misapplied this Court's precedents governing both the "severe burden" and "state interest" prongs of the *Timmons* balancing test. The court relied on *Meyer v. Grant*, 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), to determine that Ohio's law "severely burdens" core political speech, but the regulations in *Meyer* and *Buckley* were nothing like Ohio's pay-per-signature ban. The Sixth Circuit also unjustifiably—and inconsistently with this Court's recent decision in *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008)—minimized Ohio's interest in preventing election-related fraud. These shortcomings in the Sixth Circuit's decision on an important constitutional question justify this Court's review.

1. Ohio's law does not severely burden First Amendment rights.

Ohio's law does not impair CTR's abilities to communicate with voters or to achieve ballot access for its issues, particularly when compared to the two decisions of this Court invalidating petitioner regulations. The statute in *Meyer* completely banned the use of paid circulators, thereby dramatically limiting the number of voices to volunteers and only volunteers. *Meyer*, 486 U.S. at 419. The statute also barred proponents from using their money to amplify their speech—a prohibition that this Court likened to the invalidity of limits on independent political expenditures under *Buckley v. Valeo*, 424 U.S. 1 (1976). See *Meyer*, 486 U.S. at 419. Similarly, in *Buckley v. American Constitutional Law Foundation*, the Court found that requiring circulators to be registered voters significantly reduced the number of available voices. Only 65% of the voting-age population was registered to vote, so a requirement that eliminated 35% of the population caused a direct "speech diminution of the very kind produced by the ban on paid circulators at issue in *Meyer*." *Buckley*, 525 U.S. at 193 n.15, 194.

Ohio's regulation, by contrast, neither bars a single voice, cf. *Buckley*, 525 U.S. at 194-95, nor prevents a citizen from using money to amplify her message, cf. *Meyer*, 486 U.S. at 419. Ohio's law affects only petition circulators who insist on being paid by the signature. And, as Ohio demonstrated in its Petition, CTR failed to show that Ohio's law affects a significant number of petition circulators. Pet. at 28-30. Indeed, CTR offered the testimony of only one professional circulator who said that she

would not work in Ohio if the ban went into effect. Pet. at 28. Ohio's law is therefore qualitatively different from the regulations at issue in *Meyer* and *Buckley*, and it is more than justified by the countervailing state interests.

2. Election-fraud prevention justifies Ohio's reasonable, non-discriminatory regulation.

Ohio's law is amply supported by the commonsense notion that payment by the signature encourages fraud. More than that—and even though settled law does not require a State to let fraud happen before it can regulate—Ohio introduced evidence that fraud has occurred in the State during the petition-circulating process. The Sixth Circuit erroneously ignored both common sense and Ohio's proffered evidence when it struck down the ban, *Citizens for Tax Reform*, 518 F.3d at 387, and CTR has not rebutted Ohio's showing that the Sixth Circuit's fundamental errors require this Court's review.

First, the Sixth Circuit's and CTR's approach would require States to suffer the adverse consequences of petition fraud before legislating, even though this Court's decisions support the State's right to act proactively to prevent fraud. In *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), for example, the Court advised against prohibiting proactive state solutions: "To require States to prove actual [fraud] . . . would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." *Id.* at 195. That situation, the Court explained, would be untenable, because

"[l]egislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively." *Id.*

Second, CTR asserts that a court should defer to a State's interest in preventing fraud only after determining that the burden is not severe, see Opp. at 23, but that approach flips this Court's case law on its head. In *Crawford*, for instance, this Court first considered the State's important interest in preventing election fraud, and then, with that interest as a backdrop, evaluated the alleged burden on First Amendment interests. The Court recognized how high a standard the plaintiffs faced: "Given the fact that petitioners have advanced a broad attack on the constitutionality of [the statute] . . . they bear a heavy burden of persuasion." *Crawford*, 128 S. Ct. at 1622. Just as the *Crawford* plaintiffs did not meet that high burden, *id.* at 1624, so, too, CTR fails to show that Ohio's interest in protecting against fraud in insufficient to justify the payment-per-signature prohibition.

* * *

The Sixth Circuit has painted Ohio into a corner and then tied its hands. The appeals court's opinion tells the State that it must wait for fraud to occur before it can regulate, and even then the court will give credence to the State's evidence of fraud only if the court decides that the burden on the petition circulators—which need not be supported by much, if any, evidence—is less than severe. That approach directly conflicts with the decisions of both this Court and the courts of appeals. This Court's review is warranted.

CONCLUSION

For all of the above reasons, the Court should grant Ohio's Petition for Certiorari.

Respectfully submitted,

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